

***United States Court of Appeals
for the Second Circuit***



JOINT APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

77-1057

-----x
UNITED STATES OF AMERICA

Plaintiff-Appellee

-v-

JOHN EVANS and MARCUS HAND

Defendants-Appellants
-----x

Docket No. 77-1057

B
PYS

APPELLANTS' JOINT APPENDIX

Jerome Allan Landau
Attorney for Defendant Evans
401 Broadway
New York, N.Y.



STUART R. SHAW
ATTORNEY AT LAW
600 MADISON AVENUE
NEW YORK, N. Y. 10022

BEST COPY AVAILABLE

PAGINATION AS IN ORIGINAL COPY

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BEST COPY AVAILABLE

United States Court of Appeals
for the Second Circuit

UNITED STATES OF AMERICA

- v -

JOHN J. EVANS
MARCUS HAND

United States Court
Southern District of
New York
Criminal
Case No. 76 CR 0502
Judge BRyan

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

JOHN G. EVANS
MARCO'S HAND

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
NEW YORK

CASE NO. 76-01082

JUDGE: 147PN

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

U.S.C.A. NO. T-6833

-----X
United States of America

-v-

John Evans and Marcus Hand

U.S. DISTRICT COURT
SOUTHERN DISTRICT OF
NEW YORK

CASE NO. 76 Cr 502

JUDGE Ryan

-----X
1st SUPPLEMENTAL RECORD

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United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA

- V -

JOHN J. EVANS
MARLUS HAND

United States Court
Southern District of
New York

Criminal

Case No. 76 CR 0502

Judge

BRYAN

Index to the Record on Appeal

Documents

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Certified copy of indictment

1

Filed GOVT'S NOTICE OF READINESS FOR TRIAL

2

Filed affdvt. of ALLEN R. BENTLEY, AUSA, IN SUPPORT
OF WRIT OF HABEAS CORPUS, RET. 9-7-76

3

Filed DEFT'S. affdvt. and NOTICE OF MOTION
FOR RENEWAL OF MOTION OF SEVERANCE, IMMEDIATE
AND SPEEDY TRIAL, etc, ret on SEPT. 24, 1976
AT 2:30 P.M.

4

FILED GOVT'S. requests to CHARGE

5

FILED DEFTS request to CHARGE

6

FILED DEFTS PRO-SE MOTION FOR
IDENTIFICATION HEARING

7

FILED DEFTS. AFFDVT. AND NOTICE OF MOTION
FOR AN ORDER DISMISSING THE INDICTMENT AND
FOR SUCH OTHER AND FURTHER RELIEF AS THIS
COURT MAY DEEM JUST, PROPER AND IN THE
INTEREST OF JUSTICE.

8

FILED GOVT'S AFFDVT. AND NOTICE OF MOTION
FOR AN ORDER DIRECTING THAT THE DEFT.
BE TRIED SEPARATELY.

9

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FILED TRANSCRIPT OF RECORD OF
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FILED GOVT'S MEMORANDUM OF LAW IN
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16

36th day of DEC. 1976

CLERK'S OFFICE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

-V-

JOHN J. EVANS
MARCUS HAND

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
NEW YORK.

CASE NO. 76 CR 0502

JUDGE: BRYAN

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FOR OFFENSE NO
MISDEMEANOR M
FELONY

0856

HAND, MARCUS

0524

76

0502

0208 1

Disp./Sentence

(LAST, FIRST, MIDDLE)

JUVENILE

No. of Pels

Docket No.

U.S. TITLE/SECTION

OFFENSES CHARGED

ORIGINAL COUNTS

18:371
18:2113 (a)
18:2113 (d)

Consp. to viol. Firearms Act.
Bank robbery.
Armed bank robbery.

1
2
3

U.S. MAG
CASE NO

BAIL • RELEASE

☐ AMT ☐ Fugitive
☐ Denied ☐ Set ☐ Pers. Reco
☐ PSA
☐ Date ☐ 10% Deposit
☐ Surety Bond
☐ Bail Not Made ☐ Collateral
☐ Status Changed (See Docket) ☐ 3rd Cust ☐ On

II. KEY DATES & INTERVALS

ARREST or

INDICTMENT

ARRAIGNMENT

TRIAL

U.S. Custody Began

High Risk Date

Information ☐

Trial Set For

Voir Dire ☐

Summons Served

Indict. Waived ☐

Superseding
Indict/info ☒

1st Plea

☐ NG ☐ G ☐ NOL

Trial Began ☐

First Appearance

In Charging
District

5-24-76

Final Plea

☐ NG ☐ G ☐ NOL

Trial Ended ☐

8-20-75

SENTENCE

Disposition
of Charges

☐ Convicted. ☐ On All Charg
☐ Acquitted ☐ On Lesser
☐ Dismissed ☐ WOP ☐ W
☐ On Government Motion

MAGISTRATE

Search

Issued

Return

Summons

Issued

Served

Arrest Warrant Issued

COMPLAINT

OFFENSE
(In Complaint)

DATE

INITIAL/NO.

INITIAL APPEARANCE DATE

PRELIMINARY
EXAMINATION
OR

REMOVAL
HEARING

☐ WAIVED ☐ NOT WAIVED

☐ INTERVENING INDICTMENT

Date
Scheduled

Date
Held

Tape Number

INITIAL/NO.

OUTCOME

☐ DISMISSED
HELD FOR CJ OR OTHER PRO-
CEEDING IN THIS DISTRICT

☐ HELD FOR CJ OR OTHER PRO-
CEEDING IN DISTRICT BELOW

U.S. Attorney or Asst

Allen R. Bentley
791-0043

ATTORNEYS

Defense: ☐ CJA ☐ Ret. ☐ Waived ☐ Self ☐ None / Other: ☐ PD ☐ CD

Stewart Shaw
600 Madison Ave.
New York, NY 10022

* Show last names and suffix numbers of other defendants on same indictment/information:

Evans, et al.

DATE

(DOCUMENT NO.)

PROCEEDINGS

EXCLUDABLE DELAY
(a) (b) (c)

5-24-76

Filed indictment.

Case assigned to Judge Griesa superseding 75 Cr 965.

Brieant,

6-1-76

B/W Ordered. GRIESA, J.

6-1-76

Bench warrant issued.

7-7-76

Filed Govt's Notice of readiness for trial.

8-16-76

Filed affdvt. of Allen R. Bentley, AUSA, in support of writ of H/C
ad pros.. Ret. 9-7-76

9-13-76

Filed affdvt. & notice of motion to dismiss the indictment,
to suppress, for pre-trial hearing...Ret. 9-16-76....

9-16-76

Deft is directed by the Court to give hand writing samples to
agent for Govt.. Deft is held in CIVIL CONTEMPT by the Court.
Deft will have an additional day added to any Federal Sentence
imposed in Phila. for each day of refusal....Griesa, J. ..

9-17-76

Filed affdvt. of R.D. Weinberg, AUSA IN Opposition to dismiss...

DOCUMENT NO.	Section	Excl. Delay	Code	Unit
		(a)	(b)	(c)
9-23-76	Filed defts. affdvt. and notice of motion for renewal of severance; immediate and speedy trial, ret. on: Sept. 24, 1976 at 2:30pm.			
9-27-76	Case is reassigned to Judge Bryan, m/n			
9-27-76	Filed memo end. on defts. motion dtd. 9/23/76 -- Motion disposed of at pre-trial conference on 9/24/76--see minutes. Bryan, J. m/n			
9-27-76	Filed memo end. on defts. motion dtd. 9/13/76--Motion disposed of at PTC on 9/24/76. See minutes. Bryan, J. m/n			
10-4-76	Filed govts. requests to charge.			
10-5-76	Jury Trial began as to deft. John J. Evans, Marcus Hand, and Bruce Reavis.			
10-6-76	Simmions hearing held and concluded. Motion for suppression...Denied. Trial continued.			
10-7-76	Trial continued Bruce J. Reavis, - Motion granted Judgment of acquitted. Bond exonerated...BRYAN.J.			
10-8-76	Trial continued.			
10-11-76	Trial continued Court dismissed Count (1) one as to both defts. Evans & Hand...BRYAN.J.			
10-12-76	Trial continued and concluded. Mistrial as to both defts. Deft. Hand. Writ satisfied. Deft. Evans Writ. continued sune die....BRYAN.J.			
10-13-76	Filed defts. request to charge.			
10-26-76	Motion for severance of Deft. Marcus by the Govt. is Granted.....BRYAN.J.			
10-10-75	Filed affdvt. and notice of motion for an order directing that the deft. be tried separately.			
11-17-76	Filed transcript of record of proceedings, dated 9-10-76			
11-19-76	Filed Govt's memorandum of law in opposition to deft's motion to dismiss the indictment.			
11-19-76	Filed Govt's affdvt. in opposition to deft's motion to dismiss the indictment.			
11-23-76	Filed Govt's notice of readiness for trial.			
12-7-76	Filed memorandum & order The motion of the deft. to dismiss the indictment is in all respects denied... BRYAN.J. m/n			
12-8-76	Filed Govts. affdvt. for writ of habeas corpus directed to Warden of Holmesburg State Prison, Writ Ret. 12-15-76.			

CONTINUED ON pg 3

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

JUDGE GRIESA
 DEFENSE PO JUDGE ~~XXXXXXXX~~ Assigned U.S.
 DEFENSE MO 0856
 DEFENSE MR
 DEFENSE NO 0208

EVANS, JOHN J.

 Case Filed
 Mo Day
 05/24
 No. of Defs
 04

76 0502 01

JUVENILE

U.S. MAG
CASE NO

BAIL • RELEASE

☐ AMT ☐ Fugitive
☐ Denied ☐ Set ☐ Pers. Recor.
☐ PSA

S 000 CONDITIONS

☐ Date ☐ 10% Deposit
☐ Surety Bond

☐ Bail Not Made ☐ Collateral
☐ Status Changed (See Docket) ☐ 3rd ☐ Pny Cust ☐ Other
SUPERSEDING
COUNTS

II. KEY DATES & INTERVALS

ARREST or	INDICTMENT	ARRAIGNMENT	TRIAL
U.S. Custody Began	High Risk Date	Information <input type="checkbox"/>	Trial Set For
Summons Served	Indict. Waived <input type="checkbox"/>	1st Plea	Voir Dire <input type="checkbox"/>
First Appearance	In Charging District	Final Plea	Trial Began <input type="checkbox"/>
8-20-75	Superseding Indict/Info <input checked="" type="checkbox"/>	NG <input type="checkbox"/> G <input type="checkbox"/> NOL	Trial Ended <input type="checkbox"/>
	5-24-76	G. Plea W/Drawn	
		NG <input type="checkbox"/> G <input type="checkbox"/> NOL	

SENTENCE

Disposition of Charges

☐ Convicted ☐ On All Charges
☐ Acquitted ☐ On Lesser Offenses

☐ Dismissed: ☐ WOP: ☐ WP

☐ On Government Motion

MAGISTRATE

DATE	INITIAL/NO.	INITIAL APPEARANCE DATE	INITIAL/NO.	OUTCOME
Search Warrant	Issued	PRELIMINARY EXAMINATION	Date	DISMISSED HELD FOR CJ OR OTHER PROCEEDING IN THIS DISTRICT
Summons	Issued	OR	Scheduled	
Arrest Warrant Issued	Returned	REMOVAL	Date	HELD FOR CJ OR OTHER PROCEEDING IN DISTRICT BELOW
COMPLAINT	Served	HEARING	Date	
OFFENSE (in Complaint)		WAIVED <input type="checkbox"/> NOT WAIVED <input type="checkbox"/>	Tape Number	
		INTERVENING INDICTMENT		

U.S. Attorney or Asst.

Allen R. Bentley

ATTORNEYS

 Defense: ☐ CJA ☐ Ret: ☐ Waived ☐ Self ☐ None ☐ Other ☐ PO ☐ CO

 Jerome Allen Landau
 401 Broadway
 New York, NY 10013

Show last names and suffix numbers of other defendants on same indictment/information

DATE	DOCUMENT NO.	PROCEEDINGS	EXCLUDABLE DELAY
5-24-76	Filed indictment.		(a) (b) (c) (d)
6-1-76	Case assigned to Judge Griesa superseding 75 Cr 965.		
6-1-76	B/W Ordered. GRIESA, J		
	Bench warrant issued..		
7-7-76	Filed Govt's Notice of readiness for trial.		
8-16-76	Filed affdvt. of Allen R. Bentley, AUSA, in support of writ of HC ad pros.. Ret. 9-7-76		
9-10-76	Filed affdvt. of A.R. Bentley, AUSA in support of a Writ ad test. for Otis Babb, Jr.... Ret. 9-16-76...		
9-16-76	Deft is directed by the Court to give hand writing samples to agent for Govt... Deft is held in CIVIL CONTEMPT by the Court. Deft will have an additional day added to any Federal Sentence imposed in Phila. for each day of refusal.... Griesa, J.		
9-27-76	Case is reassigned to Judge Bryan, m/n		

Briant, J.

A9

OPPOSITE THE APPLICABLE DOCKET ENTRIES SHOW, IN SECTION V, ANY OCCURRENCE OF EXCLUDABLE DELAY		IV. PROCEEDINGS (continued)		PAGE TWO		V. EXCLUDABLE DELAY	
DATE	DOCUMENT NO.	Interval Section 1 (a)	EXCLUDER Excl Date (b)	LA Code (c)	Total Days (d)		
9-23-76	Filed defts. affdvt. and notice of motion for renewal of motion of severance; immediate and speedy trial, etc, ret. On: Sept. 24, 1976 at 2:30pm.						
9-27-76	Filed memo end. on defts. motion dtd. 9/23/76--Motion disposed of at pre-trial conference on 9/24/76. See minutes. Bryan, J. m/n						
10-4-76	Filed govts. requests to charge.						
10-5-76	Jury Trial Began as to deft. John J. Evans, Marcus Hand, and Bruce Reavis.						
10-6-76	Simmons hearing held and concluded. Motion for suppression...DENIED Trial continued.						
10-7-76	Trial continued Bruce J. Reavis, - Motion granted Judgment of acquitted. Bond exonerated... BRYAN.J.						
10-8-76	Trial continued.						
10-11-76	Trial continued Court dismissed Count (1) one as to both defts. Evans & Hand.... BRYAN.J.						
10-12-76	Trial continued and concluded. Mistrial as to both defts. Deft. Hand. Writ satisfied. Deft. Evans Writ. continued sine die....BRYAN.J.						
10-13-76	Filed defts. request to charge.						
10-20-76	Filed defts. pro-se motion for identification hearing.						
10-26-76	Filed defts. affdvt. and notice of motion for an order dismissing the indictment and for such other and further relief as this Court may deem just, proper and in the interest of justice.						
10-26-76	Deft. Evans Produced by writ pleads not Guilty to counts 2 & 3. Jury trial begun as to deft. evans only.						
10-27-76	Trial continued.						
10-28-76	Trial continued.						
10-29-76	Trial continued & concluded. Jury verdict. Deft. found guilty on counts 2 & 3. Pre. Sentence Report. Sentencing no date. Remanded. Writ adj. Sine die. BRYAN.J.						
10-10-76	Filed Govt's affdvt. and notice of motion for an order directing that the deft. be tried separately.						
10-10-76	Filed Govts. affdvt. in opposition to deft's motion for an identification hearing.						
11-17-76	Filed Transcript of record of proceedings, dated 9-10-76.						
11-19-76	Filed Govt's memorandum of law in opposition to deft's motion to dismiss the indictment.						
11-19-76	Filed Govt's affdvt. in opposition to deft's motion to dismiss the indictment.						
FINE AND RESTITUTION PAYMENTS							
DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER		

A 10

DATE

PROCEEDINGS

12-7-76 Filed memorandum & order The motion of the deft. to dismiss the indictment is in all respects denied.....BRYAN.J. m/n

12-09-76 Filed Judgment & Commitment (atty Jerome Landau, Esq.,) The defts. is hereby committed to the custody of the Atty. General or his authorized representative for imprisonment for a period of TWENTY (20) YEARS on count 2. It is further ordered that there will be no sentence on count 3.....BRYAN.J.
Issued all copies.

12-9-76 Filed notice of appeal from the judgment of conviction entered on the 9 th day of Dec. 1976 Mailed notice to U.S. Atty. & Atty. for the deft. 401 Broadway N.Y. N.Y. 10013.

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk

By M. J. [Signature]
Deputy Clerk

ARL:ms
77-6086
2-625

RECEIVED
MAY 23 1976
BY COURT R. SHAW

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA :

-v- :

JOHN J. EVANS,
MARCUS HAND,
BRUCE I. REAVIS and
RICHARD WALLS, JR.,

Defendants.

: INDICTMENT

: S 75 Cr.

COURT ONE

The Grand Jury charges:

1. From on or about the 1st day of July, 1975, through on or about the 31st day of August, 1975, in the Southern District of New York and elsewhere, JOHN J. EVANS, MARCUS HAND, BRUCE I. REAVIS and RICHARD WALLS, JR., the defendants, and Raymond Lawrence Johnson, Jr., named herein as a co-conspirator but not as a defendant, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other and with others to the Grand Jury known and unknown to commit offenses against the United States, to wit, violations of Section 2113 of Title 18, United States Code.

2. It was part of said conspiracy that JOHN J. EVANS, MARCUS HAND, BRUCE I. REAVIS and RICHARD WALLS, JR., the defendants, and their co-conspirators would unlawfully, wilfully and knowingly, by force and violence and by intimidation, take from the person and presence of another, property and money belonging to and in the care, custody, control, management and possession of the Chase Manhattan Bank, 580 Third Avenue, New York, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation.

3. It was a further part of said conspiracy that JOHN J. EVANS, MARCUS HAND, BRUCE I. REAVIS and RICHARD WALLS, JR., the defendants, and their co-conspirators would unlawfully, wilfully and knowingly, in committing and attempting to commit the offense set forth in Count Two of this Indictment, assault and put in jeopardy the lives of persons by the use of dangerous weapons, namely, firearms.

OVERT ACTS

In furtherance of said conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the Southern District of New York:

1. On or about August 1, 1975, JOHN J. EVANS, MARCUS HAND, BRUCE I. REAVIS and RICHARD WALLS, JR., the defendants, co-conspirator Raymond Lawrence Johnson, Jr., and a sixth co-conspirator unknown to the Grand Jury entered the Chase Manhattan Bank at 580 Third Avenue, New York, New York.
 2. On or about August 1, 1975, in said bank, the defendant RICHARD WALLS, JR. placed a briefcase on a counter top, opened it and took out a revolver.
 3. On or about August 1, 1975, the defendant MARCUS HAND and co-conspirator Raymond Lawrence Johnson, Jr., vaulted over the tellers' counter of said bank.
 4. On or about August 1, 1975, in said bank, the defendant JOHN J. EVANS assaulted a bank guard.
 5. On or about August 1, 1975, in said bank, the defendant JOHN J. EVANS struck a bank customer with his fist.
- A 17

ALL:ec
77-2066
C-675

6. On or about August 1, 1975, in said bank, the defendant RICHARD WALLS, JR., kicked said bank customer, knocking him to the floor.

7. On or about August 1, 1975, in said bank, the defendant RICHARD WALLS, JR., ordered all bank customers and employees to lie on the floor.

8. On or about August 1, 1975, the defendant BRUCE I. REAVIS stood near the entrance to said bank holding a gun and looking out at the street.

(Title 18, United States Code, Section 371.)

COUNT TWO

The Grand Jury further charges:

On or about the 1st day of August, 1975, in the Southern District of New York, JOHN J. EVANS, MARCUS HARRIS, BRUCE I. REAVIS and RICHARD WALLS, JR., the defendants, unlawfully, wilfully and knowingly, by force and violence and by intimidation, did take and attempt to take from the person and presence of another property and money in the approximate amount of \$29,506.41, belonging to, and in the care, custody, control, management and possession of the Chase Manhattan Bank, 580 Third Avenue, New York, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation.

(Title 18, United States Code, Sections 2113(a) and 2.)

COUNT THREE

The Grand Jury further charges:

On or about the 1st day of August, 1975, in the

ALL-See
72-0000
A-626

Southern District of New York, JOHN J. EVANS, MARCUS HAND,
IRVING I. BLAVIS and RICHARD WALLS, JR., the Defendants,
unlawfully, wilfully and knowingly, in committing and
attempting to commit the offense set forth in Count Two
of this Indictment, did assault and put in jeopardy the
lives of persons by the use of dangerous weapons, namely,
firearms.

(Title 18, United States Code, Sections 2113(d)
and 2.)

FORWARDED

ROBERT B. FISKE, JR.
United States Attorney

TO: WARDEN
HOLMESBURG STATE PRISON
600 State Road
Philadelphia, Pennsylvania

and the United States Marshal for the Southern
District of New York and Eastern District of
Pennsylvania
GREETING:

YOU ARE HEREBY COMMANDED to have the body of
MARCUS HAND, PHPD No. 488257
detained in the HOLMESBURG STATE PRISON

under your custody as it is said, under safe and secure
conduct, at the United States Court House, Foley Square,
New York, N.Y., on April 23, 1976, at 10:30 o'clock
in the forenoon, to testify before the Grand Jury in
connection with a certain case now being investigated by
the United States Attorney for the Southern District of
New York in the matter of United States of America v.

John Doe and immediately
after the said MARCUS HAND, PHPD No. 488257
shall have given his testimony that you return him to
the said Holmesburg State Prison

under safe and secure
conduct, and have you then and there this writ.

WITNESS the Honorable David N. Edelstein,
Chief Judge of the United States District Court for the
Southern District of New York, at the United States Court
House, Foley Square, New York, N.Y. this 19th day of
April, 1976.

Raymond J. [Signature]
CLERK
United States District Court
Southern District of New York

The foregoing writ is hereby allowed.

70-76 (5/4/1)

U.S.D.J.

U.S.D.J.

EXHIBIT B

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AR:emw

THE PRESIDENT OF THE UNITED STATES OF AMERICA

TO: WILSON HOLMESBURG STATE PRISON
1001 State Road
Philadelphia, Pennsylvania

and the United States Marshal for the Southern
District of New York, and Eastern District
Pennsylvania

GREETING:

YOU ARE HEREBY COMMANDED to have the body of
JOHN EVANS, PHPD No. 512652
detained in the Holmesburg State Prison

under your custody as it is said, under safe and secure
conduct, at the United States Court House, Foley Square,
New York, N.Y., on April 23, 1976, at 10:30 o'clock
in the forenoon, to testify before the Grand Jury in
connection with a certain case now being investigated by
the United States Attorney for the Southern District of
New York in the matter of United States of America v.

John Doe and immediately
after the said JOHN EVANS, PHPD No. 512652
shall have given his testimony that you return him to
the said Holmesburg State Prison

under safe and secure
conduct, and have you then and there this writ.

WITNESS the Honorable David N. Edelstein
Chief Judge of the United States District Court for the
Southern District of New York, at the United States Court
House, Foley Square, New York, N.Y. this 18th day of
April, 1976.

Raymond A. [Signature]
CLERK
United States District Court
Southern District of New York

The foregoing writ is hereby allowed.

[Signature]
U.S.D.J.

EXHIBIT A

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of her whole statement.

THE COURT: I don't have a recollection of that.

There is nothing more to come from the New York City Police Department?

MR. BENTLEY: That is right.

THE COURT: That being so, I will now rule on the Simmons suppression motion.

Having examined the exhibits and listened to the testimony, it is quite plain to me that the photo spreads that were shown to these witnesses were not impermissibly or unnecessarily suggestive in the light of the totality of the surrounding circumstances.

The motion for suppression and indeed, if there be any further motion with respect to in-court identification, those motions are both denied.

Any questions, of course, during the course of the trial that may arise are reserved. I am not passing on anything at this point that may develop on the trial. I am merely passing on the present motion on a Simmons basis and making those findings and denying motions.

MR. SHAW: If I could have a moment more of your time.

I most respectfully request that Mr. Bentley

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

M-845

----- -x
UNITED STATES :

-against- :

76 Cr. 502

JOHN EVANS and MARCUS HAND, :

Defendants. :
----- -x

DEC 7 1976
S. D. OF N. Y.

APPEARANCES:

ALLEN R. BENTLEY, Assistant U.S. Attorney
(Robert E. Fiske, Jr., U.S. Attorney
for the Southern District of New York)

JEROME A. LANDAU, Esq. (New York, New York),
for defendant Evans.

STUART R. SHAW, Esq. (New York, New York),
for defendant Hand.

M E M O R A N D U M

BRYAN, DISTRICT JUDGE:

Defendants John Evans and Marcus Hand were charged in indictment 76 Cr. 502 with various offenses committed during their alleged participation in the armed robbery of a Chase Manhattan Bank branch located at 580 Third Avenue, New York, New York, on August 1, 1975. Their first trial, which began on October 5, 1976, resulted in a mistrial when the jury was unable to reach verdicts as to the two counts

MICROFILM

outstanding against them.^{1/} A retrial was scheduled for October 26, 1976. On that date, the Government's motion to sever as to defendant Hand because of the unavailability of Hand for trial was granted on consent, and the retrial of Evans began. On October 29, 1976, the jury returned a verdict of guilty against Evans on both remaining counts. A retrial of defendant Hand is presently scheduled to begin on December 15, 1976.

On October 26, 1976, the day Evans' retrial began, both defendants filed a motion to dismiss the indictment. Essentially, the motion raises the question whether the defendants' rights under the Interstate Agreement on Detainers (the Agreement), 18 U.S.C., App., 84 Stat. 1397 (1970), or applicable speedy trial rules have been violated.

A brief chronology will be helpful to an understanding of the issues presented. As previously mentioned, the bank robbery in question occurred on August 1, 1975. An investigation commenced immediately, and eventually turned up several suspects. One Raymond Lawrence Johnson was charged with the August 1, 1975 Chase branch robbery in indictment 75 Cr. 879.^{2/} On October 6, 1975 Bruce Reavis was indicted as an alleged participant in that robbery in indictment 75 Cr. 965. Contrary to assertions of counsel for the presently moving defendants at oral argument, neither Evans nor Hand was indicted in 75 Cr. 965, which was

eventually superseded by the present indictment, 76 Cr. 502.

By April, 1975, the Government's attention had focused on Evans and Hand as possible participants in the Chase robbery. Both men were then being held in custody by the Commonwealth of Pennsylvania, awaiting trial on homicide charges. On April 16, 1976, writs of habeas corpus ad testificandum, commanding the presence in this district on April 23, 1976 of Evans, Hand, and two other persons,^{3/} were issued.

Evans and Hand were produced in this district pursuant to these writs on April 20, 1976. On April 23, 1976, their present counsel were assigned under the Criminal Justice Act. After consultation with counsel, the defendants denied any involvement in or knowledge of the Chase robbery and declined to waive the Fifth Amendment privilege against self-incrimination and testify before the grand jury. On May 7, 1976, they were returned to Pennsylvania without having testified before the grand jury.

On May 24, 1976, after Evans and Hand had been returned to the Pennsylvania authorities, the present indictment, 76 Cr. 502, was filed. It superseded 75 Cr. 965, the Reavis indictment, and charged Evans, Hand, Reavis, and Walls with the August 1, 1975 Chase robbery. The homicide trial of Hand in the Court of Common Pleas, Philadelphia County, Pennsylvania, began in early

June 1976 and ended on June 19, 1976 with a hung jury. The homicide trial of Evans in the same court began on June 18, 1976 and ended on June 30, 1976 when the jury returned a verdict of guilty. On July 16, 1976, both defendants were convicted of an unrelated bank robbery in the United States District Court for the Eastern District of Pennsylvania.

On July 6, 1976, the Government filed its notice of readiness in the case at bar. In mid-August 1976, writs of habeas corpus ad prosequendum were issued to secure the presence of Evans and Hand in this district for trial; they appeared pursuant to the writs on or about September 7, 1976. As previously noted, their first trial in this district began on October 5, 1976, the retrial of Evans began October 26, 1976, and the retrial of Hand has been scheduled to begin on December 15, 1976.

I

The defendants contend that the indictment against them must be dismissed because the Government violated sections (c) and (e) of Article IV of the Agreement^{4/} by failing to bring them to trial within 120 days of their appearance in this district on April 20, 1976, and by returning them to Philadelphia on May 7, 1976, without having tried them. This argument must be rejected for several reasons.

The appearance of both Evans and Hand in this district on April 20, 1976 was compelled by a writ of habeas corpus ad testificandum. Although a federal writ of habeas corpus ad prosequendum, also issued under 28 U.S.C. 2241(c)(5), is a "detainer" entitling a state inmate to the protection provided in Article IV of the Agreement, see United States v. Mauro, Nos. 76-1251, 76-1252 (2d Cir., decided Oct. 26, 1976) slip op. at 271,^{5/} the same cannot be said for the writ ad testificandum.

Article IV(a) of the Agreement permits an appropriate officer of a jurisdiction "in which an untried indictment, information, or complaint is pending" to have a "prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party State "made available for trial subject to certain conditions not relevant here. The article thus contemplates that a criminal charge be outstanding against a prisoner in the receiving state and that a "detainer" based upon that charge be lodged against the prisoner before its mechanism becomes operative.

The legislative history of the Agreement defines a detainer as

a notification filed with the institution in which a prisoner is serving a sentence, advising him that he is wanted to face pending criminal charges in another jurisdiction.

S. Rep. No. 1356, 91st Cong., 2d Sess., 3 U.S. Code Cong. & Admin. News 4864, 4865 (1970); 116 Cong. Rec. 13992 (1970).

Mauro read this definition as encompassing a writ of habeas corpus ad prosequendum, which writ in these circumstances presupposes a pending criminal charge. A writ of habeas corpus ad testificandum, in contrast, issued to secure the presence of state prisoners to testify before a grand jury or at trial and not to answer any outstanding criminal charges in the receiving district, cannot be characterized as a "detainer" within the meaning of the Agreement, and the provisions of Article IV on which the defendants rely were not applicable to their appearance in this district on April 20, 1976. Cf. United States v. Ricketson, 498 F.2d 367, 373 (7th Cir.), cert. denied, 419 U.S. 965 (1974).

This conclusion is also mandated by the fact that in April, 1976, the defendants were pre-trial detainees in the sending state of Pennsylvania.^{6/} As previously noted, Article IV of the Agreement establishes an apparatus for securing the presence for trial of a "prisoner ... serving a term of imprisonment" in any party state. Moreover, the purpose of the Agreement is to insure the speedy and orderly disposition of charges against persons who are serving prison sentences because such charges, wherever pending, "produce uncertainties which obstruct programs of prisoner treatment and rehabilitation." Agreement, Article I. Both the express language and purpose of the Agreement pertain to prisoners who have already been convicted and have entered

upon a term of imprisonment, and not to persons held in custody solely to await trial. Thus, the defendants cannot invoke Article IV(c) and (e) in connection with their April 20, 1976 appearance. See Davidson v. State, 18 Md. App. 61, 305 A.2d 474 (Md. Ct. of Special Appeals 1973); Seymour v. State, 21 Ariz. App. 12, 515 P.2d 39 (Ct. App. Ariz. 1973).

Since the defendants were produced on April 20, 1976 pursuant to a writ of habeas corpus ad testificandum when no charges were pending against them in this district, and while they were pre-trial detainees in the sending state, neither Article IV nor any other provision of the Agreement became operative. If the production of the defendants on September 7, 1976 pursuant to writs of habeas corpus ad prosequendum triggered the protections of the Agreement under Mauro (see the discussion of their status as pre-trial detainees, supra), no violation occurred. Article IV(c) was satisfied because the October 5, 1976 trial began well within 120 days of their appearance pursuant to the writ ad prosequendum; Article IV(e) was satisfied because a trial was "had on ... [the] indictment ... contemplated hereby prior to the prisoner's being returned to the original place of imprisonment" 1/

II

The defendants also contend that the indictment against them must be dismissed because of violation of applicable speedy trial rules. This contention must also be rejected.

Until June 30, 1976, the applicable speedy trial rules were embodied in this district's Interim Plan Pursuant to the Provisions of the Speedy Trial Act of 1974 (the Interim Plan). As of July 1, 1976, the applicable rules are contained in Section III of this district's Plan for Prompt Disposition of Criminal Cases (the Plan), which implements the requirements of the Speedy Trial Act (the Act), 18 U.S.C. §§3161-74.

The first prosecutorial action taken against Evans or Hand in the case at bar came with the filing of indictment 76 Cr. 502 on May 24, 1976. Since neither defendant was being "held in custody solely for the purpose of trial" under Rule 3(a)(1), the Interim Plan only obligated the Government under Rule 5 to be ready for trial within six months of the filing of the indictment. The Government's filing of its notice of readiness on July 6, 1976 would have met this requirement.

On July 1, 1976, however, Section III of the Plan went into effect, superseding the Interim Plan. It maintained the six-month trial readiness rule in Rule 7, which the Government satisfied with the July 6, 1976 notice of readiness. In addition,

Section III of the Plan set forth time limits within which an indictment or information must be filed, an arraignment must be held, and trial must commence. See Rules 3, 4, and 5.

The indictment here was filed within the time limits prescribed by Rule 3 of the Plan. At the October 26, 1976 retrial of Evans, however, the court discovered that neither Evans nor Hand had been formally arraigned on the charges against them in accordance with Rule 4 of Section III of the Plan and Fed. R. Crim. P. 10.^{8/} The earliest that an arraignment was required by Rule 4 in this case was within 10 days of July 1, 1976, see Rule 4(a)(4), and probably it was not required until 10 days after the defendants' September 16, 1976 appearance before Judge Griesa, see Rule 4(a)(3). Using either date as the starting point for calculating the 180-day period during which the trial of defendants not held in custody solely for the purpose of trial on a federal charge must commence, the time limit prescribed by Rule 5 was met by the initial trial on October 5, 1976. The retrial of Defendant Evans was within the 60-day period after declaration of mistrial as prescribed by Rule 5(b), and a December 15, 1976 retrial of Hand would also be within this period, once the delay resulting from his retrial in the Pennsylvania courts on the Philadelphia homicide charge is excluded from the computation under 18 U.S.C. §316(h)(1)(C).

What we have, then, is a technical failure to arraign

For the above reasons, the motion of defendants Evans and Hand to dismiss the indictment is in all respects denied.

United States District Judge

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FOOTNOTES

- 1/ Counts charging each defendant with bank robbery by force, violence, and intimidation under 18 U.S.C. §2113(a), and with use of firearms during the robbery under 18 U.S.C. §2113(d), were submitted to the jury. A conspiracy count was dismissed by the court with the consent of the Government.
- The motion of co-defendant Bruce Reavis for judgment of acquittal was granted by the court at the close of the Government's case.
- 2/ The counts relating to the August 1, 1975 Chase robbery were dismissed with the Government's consent at Johnson's sentencing on his plea of guilty to four other robbery counts contained in the same indictment.
- 3/ One of these men, Otis Babb, was never charged in connection with the August 1, 1975 Chase Manhattan robbery. The other, Richard Walls, Jr., was charged in the present indictment, 75 Cr. 502, and pled guilty before Judge Griesa to count three on September 14, 1976. The writ of habeas corpus ad testificandum was satisfied as to Babb, but not as to Walls, in April, 1976.
- 4/ Article IV of the Agreement provides:
- (c) In respect of any proceeding made possible by this article, trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.
- (e) If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.
- Both the Commonwealth of Pennsylvania and the United States are parties to the Agreement.
- 5/ But see the dissenting opinion of Judge Mansfield in Mauro, supra, slip op. at 278.

6/

As of December 16, 1975, both Evans and Hand were in Pennsylvania custody as pretrial detainees. Evans was convicted on state charges on June 30, 1976; Hand has never been convicted on state charges. Both men were convicted on federal charges of bank robbery in Philadelphia on July 16, 1976. Thus at their April 20, 1976 appearance, both defendants were pre-trial detainees in the sending state; by the time of their September 7, 1976 appearance in this district apparently only Hand retained that status.

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The court thus views the initial trial of Hand at which the jury disagreed as fulfilling the requirements of Article IV(e). The policies set forth in Article I of the Agreement would not be furthered by reading Article IV(e) as requiring the receiving state to retain custody of ^{the} defendant after a mistrial until he could be retried, at least when he was still merely a pre-trial detainee in the sending state and already scheduled to be retried after an earlier mistrial there. Accordingly, I see nothing in the Agreement, assuming for the moment that it can be invoked by one held as a pre-trial detainee in the sending state, that bars the production of Hand pursuant to a writ of habeas corpus ad prosequendum for his December 15, 1976 retrial in this district.

8/

Evans was given an opportunity to plead to the indictment as soon as this was discovered, and he pled not guilty. Hand has still not been arraigned.

9/

It may be noted that while 18 U.S.C. §3161(c) sets forth separate time limits within which an arraignment and a trial must be held, 18 U.S.C. §3162(a)(2), when it takes effect, will impose sanctions only for failure to bring the defendant to trial within the appropriate period.

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2 US v. Hand (Van Pelt Bryant Frederick)
3 76 Cr. 502
4 12/17/6

CHARGE OF THE COURT:

5 THE COURT: Madam Foremen, ladies and gentlemen.
6 I am about to instruct you as to the law applicable to
7 this case.

8 Under our system of law it is my duty as the
9 judge presiding at this trial to instruct you as to the
10 law that applies here.

11 And it is your duty as jurors to follow the
12 law as I state it to you.

13 On the other hand, it is your exclusive function
14 to determine the facts in the case and to consider the
15 evidence for that purpose. Just as you cannot encroach
16 on my function, I cannot encroach on yours.

17 You are the sole judges of the facts. It is
18 not what counsel on either side has said or what I may say
19 as to what the evidence in this case **proves but it is**
20 your recollection and your judgement on the evidence that
21 must govern. It is for you to determine what the
22 evidence shows, what weight is to be given to various
23 portions of the evidence, what portion of the evidence
24 is to be believed, what reliance is to be placed on the
25 testimony of the witnesses and what reasonable inferences

2 are to be drawn from the evidence.

3 You will resolve such conflicts as there are
4 in the evidence so as to determine for yourselves where
5 the truth lies. The verdict that you reach here must be
6 based solely on the evidence given in this trial and
7 nothing else and in accordance with these instructions.

8 I should tell you that the fact that the
9 Government is a party here entitles it to no greater
10 consideration than that accorded to any other party to a
11 litigation. By the same token, it is entitled to no less
12 consideration. All parties, Government and individuals
13 alike, stand equal before this bar of justice.

14 Now, with all this in mind let's turn to the
15 case on trial before you. There are two counts or
16 charges in the indictment that will be submitted to you
17 for your consideration. The first is that the defendant,
18 Marcus Hand, participated in the robbery of a federally
19 insured bank, in this case the Chase branch at 580 - 3rd
20 Avenue, and did so, took money belonging to the bank by
21 use of force, violence or intimidation.

22 The second count charges Marcus Hand with assault
23 or putting in jeopardy the lives of persons by the use
24 of firearms during the commission of the bank robbery
25 alleged in the first count.

1 gwtg
2 Marcus Hand has pleaded not guilty to each of
3 the charges against him. He is the only defendant presently
4 before you.

5 During the course of the trial there was plenty
6 of evidence indicating that several persons other than
7 this defendant, Marcus Hand, now on trial were involved
8 in one way or another with the activities which are the
9 subject of the indictment here. I charge you that the
10 fact that these other people are not now on trial before
11 you has no significance whatever and is to play no role
12 in your deliberation. We are concerned here only with
13 whether Marcus Hand, the defendant now on trial, is guilty
14 or not guilty of the charges against him.

15 Now, before I discuss the rules of law
16 applicable to the crimes charged in the indictment, I
17 want to talk with you a little about the effect you are
18 to give the indictment and the general rules you are to
19 follow in considering and weighing the evidence.

20 The indictment that I have just referred to is
21 nothing but a written accusation. It is only a means of
22 bringing the defendant before the Court and is not in
23 itself any evidence whatsoever of guilt. The fact that
24 Marcus Hand is the subject of this indictment and on trial
25 should not be taken against him in anyway. The defendant

2 is presumed to be innocent. This presumption has the
3 weight and effect of evidence on his behalf. This
4 presumption of innocence continues in the defendant's
5 favor throughout the trial and even during your
6 deliberations in the jury room and is overcome only if
7 and when in your minds the guilt of the defendant is
8 established beyond a reasonable doubt.

9 A defendant doesn't have to prove himself
10 innocent of the charge against him. If a defendant wishes,
11 he may rest at the close of the Government's case and is
12 not required to produce any evidence on his own behalf.
13 And, of course, the defendant may rely on evidence brought
14 out on cross-examination of the prosecution's witnesses.
15 The burden of proof is on the prosecution to establish
16 the guilt of the defendant beyond a reasonable doubt as
17 to each charge against him.

18 This burden on the prosecution applies to
19 each element of the crimes charged in the indictment. The
20 burden never shifts to a defendant to prove himself
21 innocent, and a defendant, I repeat, is not required to
22 call any witnesses or submit any proof of innocence,
23 although, of course, he is fully entitled to do so.

24 The prosecution's burden is not met unless and
25 until the proof offered and all the evidence in the case

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convinces you beyond a reasonable doubt of the defendant's guilt as to the charge you are considering.

What is a reasonable doubt? The words really almost define themselves. A reasonable doubt is a doubt founded on reason arising from the evidence or the lack of evidence in the case. A reasonable doubt means a doubt which a reasonable man or a reasonable woman has after carefully weighing all the evidence. It is a doubt that appeals to your reason, your commonsense, your judgement and understanding. It doesn't mean a doubt that is capricious or imaginary or speculative, nor does it mean a doubt born out of a reluctance on the part of a juror to perform an unpleasant duty or a doubt arising out of sympathy for a defendant or out of anything other than a candid, objective consideration of all the evidence. Nor does proof beyond a reasonable doubt mean proof to a positive certainty or proof beyond all possible doubt. You should carefully review and analyze and discuss all the evidence in the case. If a fair and impartial consideration of all the evidence in the case produces a settled and firm belief in your minds of a defendant's guilt as to a particular charge such as would induce a prudent person to act without hesitation in weighty and important matters concerning his or her own affairs, then

2 you may say you have no reasonable doubt and you may find
3 the defendant guilty. In other words, proof beyond a
4 reasonable doubt must be proof from the evidence of such
5 a convincing character that a prudent person would not
6 hesitate to rely upon it if acting on important affairs of
7 his own.

8 On the other hand, if, after a fair and impartial
9 consideration of all the evidence, you find that you have
10 a doubt such as would cause a prudent person to hesitate
11 before acting in matters of importance to himself or
12 herself, then you have a reasonable doubt and you must
13 return a verdict of not guilty.

14 Now, with these general principles in mind, I
15 want to turn to the specifics of this case. As I have
16 told you, there are two charges here. Count One, the
17 robbery of the bank, and it occurred at the Chase Manhattan
18 branch at 580- 3rd Avenue, by the use of force, violence
19 and intimidation, and Count Two, assault or putting in
20 jeopardy the lives of persons by the use of firearms
21 during a robbery.

22 I will discuss the elements in each of these
23 separate charges with you. First I am going to talk to
24 you about Count One charging a robbery and you will first
25 consider that count.

1 gwtg
2 Count One charges that on or about August 1st,
3 1975, in the Southern District of New York -- the
4 defendant, Marcus Hand, unlawfully, willfully and
5 knowingly by force and violence and by intimidation
6 did take and attempt to take from the person and presence
7 of another property and money in the approximate amount
8 of \$29,000.00 belonging to and in the care and custody
9 and possession of the Chase Manhattan Bank, 580 -3rd
10 Avenue, the deposits of which were then insured by the
11 Federal Deposit Insurance Corporation.

12 The elements of the crime, each of which must
13 be proved to your satisfaction beyond a reasonable doubt,
14 are as follows: First, that on or about August 1st, 1975,
15 the Chase bank located at 580 - 3rd Avenue was a bank
16 the deposits of which were insured by the Federal Deposit
17 Insurance Corporation. That is conceded by stipulation
18 and I don't think that finding ought to bother you at all.

19 Second, that on that day Marcus Hand took money
20 from the bank which belonged to and was in the bank's
21 care, custody, control or possession.

22 Third, that the money was taken from a person
23 or presence of individuals other than Hand, namely,
24 employees or tellers of the bank.

25 Fourth, that the taking was accomplished through

the use of force, violence or intimidation.

And fifth, that Marcus Hand willfully and knowingly did all of the acts charged.

Now, the first three of those elements don't require any elaboration. As to the fourth element, which is that the taking was accompanied by force, violence or intimidation, a word or two is in order.

It is not required that the Government prove that force and violence were actually used if it proves beyond a reasonable doubt that the taking of money from the bank was the result of intimidation, that is to say, the result of placing others in fear. Intimidation may be established by proof of circumstances that are normally and reasonably calculated to arouse fear in the ordinary run of human beings. The question on this element is whether the Government has sustained its burden of showing conduct of such a nature as to provide a sensible and supportable basis for the creation of fear in other persons.

The fifth and final element to be established under Count Two, as I have mentioned, is that the defendant, this defendant, Marcus Hand, willfully and knowingly did the acts charged. I will define these terms fully later.

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2 Let me say now I am sure that you understand
3 that should you find the Chase Manhattan Bank robbed at
4 580 - 3rd Avenue on August 1st, 1975, this in itself
5 would not establish that Marcus Hand is guilty on Count
6 One. The question here, and the crucial question in
7 the case, is whether Marcus Hand participated in this
8 robbery, whether or not he was or was not one of the
9 robbers. The defendant insists that he did not participate
10 in the robbery and had nothing whatsoever to do with it.
11 Thus, you cannot find Marcus Hand guilty on Count One
12 unless you find beyond a reasonable doubt that he was
13 present in the bank on August 1st, 1975, at the time of
14 the robbery, and was one of the persons who committed the
15 robbery.

16 The burden of proof on the prosecution includes
17 the burden of proving beyond a reasonable doubt the
18 identify of the defendant as one of the persons who
19 committed and participated in the robbery with which he
20 has been charged.

21 In considering the question of identity, which,
22 as I have said, is the crucial question in this case, you
23 may take into account both the identification made of the
24 defendant or the failure to identify a defendant by
25 persons having an opportunity to do so. You may also

1
2 consider the circumstances under which a witness
3 observed the defendant and other persons engaged in the
4 robbery and how such circumstances bear on his or her
5 ability to make an identification.

6 Let me caution you that there are many
7 difficulties associated with identification testimony
8 and that it should be considered by you very carefully.

9 There is one other matter in connection with
10 Count One. As I told you, a person who actually engages
11 in a bank robbery of course commits a crime. It is also
12 a crime not only to commit these acts but also to aid
13 and abet another person in doing so. The law provides
14 that whoever aids, abets, counsels, commands or procures
15 the commission of a crime is just as guilty of the crime
16 as if he had committed it himself.

17 Accordingly, you may find that the defendant,
18 Marcus Hand, was guilty of the offense charged in Count
19 One if you find beyond a reasonable doubt that another
20 person committed the offense charged and that the defendant,
21 Hand, aided and abetted these people in carrying out the
22 crime.

23 Now, what is aiding and abetting? The question
24 is whether the person participated in the venture. Was
25 it something he wished to bring about? Did he seek by his

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2 own actions to make it succeed? If he did, then as
3 an aider and abettor he is just as guilty as the
4 principal who committed the crime.

5 You must find something more than mere knowledge
6 on a defendant's part that a crime is being committed.
7 The mere fact that one is present during the commission
8 of an offense, even if he has knowledge that the offense
9 is being committed, is insufficient to warrant a finding
10 that he aided and abetted the crime. Mere association
11 with one who commits a crime is not enough. A mere
12 spectator or bystander is not an aider or abettor. It
13 must be established that the person charged actually aided
14 and abetted in the commission of the crime before he can
15 be found guilty of aiding and abetting and did so willfully
16 and knowingly.

17 Now, if, after considering all the evidence, you
18 find the Government has proved beyond a reasonable doubt
19 that the robbery was committed as charged and that the
20 defendant, Hand, was one of the persons who committed
21 the robbery or aided and abetted in its commission, you
22 may find him guilty on Count One. If, on the other hand,
23 you find that the Government has failed to prove beyond
24 a reasonable doubt either that the robbery was committed
25 as charged or that Marcus Hand was one of those who

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2 participated in the robbery, then you must find Hand not
3 guilty on Count One.

4 As I told you, you consider Count One first.
5 If you should find the defendant not guilty on Count One,
6 you will cease your deliberations and report to the
7 Court. If, however, you find the defendant guilty on
8 Count One, you will then proceed to Count Two.

9 Now, Count Two charges that Hand, in committing
10 the robbery of the Chase Manhattan branch as charged
11 in Count One, unlawfully, willfully and knowingly
12 assaulted and put in jeopardy the lives of persons by the
13 use of dangerous weapons, that is to say, firearms.

14 This is a separate and distinct offense from
15 the offense charged in Count One.

16 In order to find Hand guilty on Count Two, you
17 must first find beyond a reasonable doubt that he
18 committed and participated in the bank robbery charged
19 in Count One. In addition, you must find that in so doing
20 Hand either assaulted one or more persons or, by the
21 use of a dangerous weapon, a firearm, put the life or
22 lives of one or more persons in jeopardy. It is not
23 essential to find both an assault and the endangering
24 of lives by the use of weapons.

25 As assault is defined as an unlawful attempt

2 or threat to use force or violence to inflict bodily
3 injury when the attempt or threat is coupled with the
4 apparent present ability to carry it out so as to arouse
5 fear in the intended or threatened victim that he or she
6 might be subject to immediate physical injury. The
7 flourishing of a gun or pistol for the purpose of putting
8 a person in fear is sufficient to constitute an assault.

9 Alternatively, if you find that the lives of
10 one or more persons were objectively placed in jeopardy or
11 danger by the use of a firearm, then you should also
12 find this second element of the offence was present.

13 Now, briefly I have used the term, "unlawfully,
14 knowingly and willfully."

15 To act **unlawfully** simply means to do an act
16 contrary to law. One acts knowingly if he acts
17 voluntarily or purposely and not because of mistake,
18 accident, mere negligence or other innocent reason. An
19 act is willfull if it is done knowingly and deliberately
20 with a specific intent to do it.

21 Questions of the defendant's knowledge and
22 willfull intent to violate the law are questions of fact
23 to be determined by you just like any other question of fact
24 to be decided. However, unlike most questions of fact
25 intent and knowledge involve what goes on in a person's mind

and what purpose motivates him in a given course of conduct.

We have not yet devised an instrument for recording what goes on in a man's mind, and I frankly hope, ladies and gentlemen, we never do. Rarely is direct proof available that a man has knowledge of a particular fact or has a particular purpose or intent in mind that he has done an act. Thus, direct proof or knowledge of illegal purposes or intent to participate in a criminal act in violation of law is not necessary. Knowledge or intent may be established by circumstantial evidence determined from the acts and conduct and all the surrounding circumstances and the natural inferences to be drawn therefrom. I will talk to you a little later about circumstantial evidence.

Now, this has been a short case and I am not going to discuss the facts with you in any detail. It seems quite clear, and the defendant does not of course deny, that a robbery occurred on August 1st, 1975, at the Chase Manhattan Bank at 38th Street and Third Avenue. The issue here is not whether a bank robbery occurred. The question is whether or not Hand participated in that robbery. That is the real question here. That in turn depends on the question of identification of Hand as a participant in the robbery.

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2 The real issue is the identification issue. That's
3 the basic question for you to decide.

4 Hand takes the position that the evidence as to
5 identification of him is not sufficient to establish
6 beyond a reasonable doubt that he was the person involved
7 in this robbery on August 1st, 1975. The Government, on
8 the other hand, contends that the evidence is sufficient
9 to identify Hand as one of the robbers beyond a reasonable
10 doubt.

11 In addition to the evidence on the question of
12 identification, evidence was introduced by the defendant
13 for the purpose of establishing an alibi, that is to say,
14 that Marcus Hand was not present at the Chase bank on
15 August 1st, 1975, where he is alleged to have committed
16 the offense charged in the indictment. He contends that
17 he was in Miami, Florida, on August 1st, 1975, and was
18 not in New York then and could not have been a
19 participant in the Chase bank robbery, and he produced two
20 witnesses who testified to that effect.

21 The Government in turn introduced evidence which
22 you heard this afternoon or I guess it was this morning
23 which it contends shows that the alibi testimony as to
24 Hand's presence in Miami on August 1st, 1975, should not
25 be credited. This evidence was to the effect that on

2 August 1st, 1975, when the two witnesses as to the alibi
3 defense claim to have bought tickets in the station in
4 Miami with Hand did not in fact buy the tickets then
5 but bought them a day earlier, and the Government claims
6 that tends to discredit or more than tends to discredit
7 their whole testimony.

8 Juror #2 Your Honor, it was train tickets.

9 THE COURT: Train tickets, that's right, yes,
10 indeed.

11 If, after consideration of all the evidence, you
12 have a reasonable doubt as to whether Hand was present
13 at the Chase bank on August 1st, where the alleged offense
14 was committed, you must acquit him. You will bear in
15 mind again, however, that the law never imposes on a
16 defendant in a criminal case the duty or burden of
17 calling any witnesses or producing any evidence. So
18 that even if the testimony of the alibi witnesses should
19 be disbelieved, the burden of proof of guilt beyond a
20 reasonable doubt remains on the Government.

21 Just a few subjects which I want to cover here and
22 then I will be finished.

23 I want to talk to you about the credibility of
24 witnesses, because, plainly, questions of credibility are
25 of some importance in this case.

2 Questions of witnesses' credibility are
3 exclusively for you to pass on. It is up to you, the
4 jury, to determine what parts of the evidence you believe
5 and what parts of the evidence you disbelieve and reject.
6 Credibility is just another name for believability. The
7 appraisal of the credibility to be given to the testimony
8 of a witness is very much governed by our own plain
9 everyday commonsense and that is why we have juries
10 because we know they have plain, everyday commonsense.

11 You watch the witnesses on the stand as they
12 testify. You ask yourselves whether they know what they
13 are talking about on a salient point, you evaluate their
14 truthfulness. You take into account the extent to which
15 they may have been impeached as witnesses either generally
16 or specifically and whether they made any statements
17 inconsistent with or contradictory to the testimony they
18 gave on the witness stand. You take into account their
19 motives, if they have any, to testify falsely. In other
20 words, what you do with a witness is to size the person
21 up and determine whether he or she is truthful, candid
22 and straightforward and whether you think you should believe
23 his testimony. You may disregard all of the testimony
24 of a witness if you don't believe it or you may accept such
25 parts as you believe and find reliable and disregard the

2 rest.

3 Now, Marcus Hand did not take the stand in this
4 case. The Constitution and laws of the United States
5 provide that in any trial of a criminal charge the defendant
6 is under no obligation to testify or, indeed, to come
7 forward with any evidence because the burden of proving
8 a violation of law is solely and exclusively on the
9 prosecution. I therefore charge you that you may not
10 consider in any way the fact that Marcus Hand has chosen
11 not to testify in this case. That is his right under the
12 law and you are not permitted to speculate upon the
13 reasons why he didn't testify, nor may you draw any
14 inferences of any kind from his decision not to take
15 the stand.

16 Now I want to discuss very briefly the subject
17 of circumstantial evidence. There are two classes of
18 evidence recognized and admitted in the courts. One is
19 direct and the other is circumstantial. You may consider
20 both kinds, of course, in determining the guilt or
21 innocence of the accused.

22 Direct evidence is where a witness testifies to
23 facts of his own knowledge or things that he saw, that
24 he was present at, that he watched. Anything that a
25 witness testifies about which comes to him by virtue of his

own senses, his own observations is direct evidence.

Circumstantial evidence is where proof is given of facts or circumstances from which one may infer other connected facts which reasonably follow in the common experiences of mankind.

Let me give you a simple example.

Suppose you are in a house, the shades are pulled down, and a man comes in wearing a wet raincoat and rubbers, his hat is wet and he has an umbrella in his hand. Since the shades are pulled down and you haven't looked out, you haven't seen of your own knowledge and you do not know whether it is raining outside. But even if you haven't seen whether or not it is raining, because the man came in with a dripping umbrella, wet raincoat and so forth, obviously you are entitled to conclude that it was raining outside. That is, of course, an oversimplification of what I am talking about but it is an illustration of what we mean by circumstantial evidence.

Circumstantial evidence, if it is believed, is of no less value than direct evidence, for in either case, no matter what type of evidence you are considering, you must be convinced in the last analysis beyond a reasonable doubt of the defendant's guilt before you can

2 convict him of a charge.

3 I think all of you must remember that no
4 conviction can be based on suspicion or conjecture or
5 speculation no matter how strong. A conviction can only
6 be based on actual proof of guilt beyond a reasonable
7 doubt. If the proof doesn't reach that standard you
8 must acquit. With these general principles I have given
9 you, you will consider all the evidence and approach the
10 important question of whether the prosecution has proved
11 beyond a reasonable doubt that Marcus Hand is guilty
12 of the charges against him.

13 You must remember it is not the quantity of
14 witnesses, the number of witnesses, or the quantity of
15 proof which determines an issue for or against the
16 defendant; it is the quality of the evidence in terms
17 of its believability and truthfulness under the standards
18 that I have given you which should be controlling in your
19 mind.

20 If you find that the evidence fails to establish
21 a crime charged or any element of the crime charged in this
22 case against Marcus Hand beyond a reasonable doubt, you
23 must find Marcus Hand not guilty on that charge if the
24 evidence fails to establish beyond a reasonable doubt the
25 crime charged. However, if you find beyond a reasonable

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2 doubt that Marcus Hand has violated the law as charged,
3 you should not be reluctant because of sympathy or for
4 any other reason to bring in a verdict of guilty.

5 The actions of the Court during the trial in
6 ruling on objections or in questioning witnesses are
7 not to be taken by you as any indication of guilt or
8 innocence. They are merely matters of procedure and law,
9 my concern, not yours. The arguments of counsel addressed
10 to the Court or on motions during the course of the trial
11 or any conferences that may have taken place at the
12 side bar here are also to be disregarded. Counsel's
13 statements and arguments on summation are not evidence,
14 nor are the questions they asked. The only evidence is
15 the evidence given on the witness stand as you recollect
16 it and the exhibits in evidence and the stipulations of
17 fact entered into between opposing counsel.

18 And remember, where an answer of a witness has
19 been excluded or stricken from the record, you must disregard
20 both the question and the answer.

21 Now, I talked a number of times and used the
22 word "inference" a number of times. What do I mean by
23 "inference?" Simply this: an inference is a deduction
24 or conclusion which reason and commonsense leads the jury
25 to draw from facts which have been proved. Remember it is

2 your recollection of the evidence presented here, and your
3 decision as to what reasonable inferences should be
4 drawn therefrom which governs.

5 There have been a number of stipulations
6 entered into at this trial pertaining to such matters as
7 the insurance by the FDIC of the Chase Manhattan Bank, the
8 amount of loss to the bank from the robbery and so forth.
9 Each such stipulation is the equivalent for your purpose
10 of live testimony from the witness stand concerning
11 the facts set forth in the stipulation.

12 The question of possible punishment of the
13 defendant should he be convicted is of no concern to you.
14 It should not enter into your deliberations in any way
15 or influence them in anyway. If there should be a finding
16 of guilty as to the defendant, the duty of imposing
17 sentence rests exclusively with me, it is no function of
18 yours.

19 I am not going to say much to you about your
20 deliberations. I think all of you understand that the
21 object of jury deliberation is to exchange views with
22 your fellow jurors, to discuss and consider the evidence
23 and listen to everybody's argument and to reach an
24 agreement based solely on the evidence, if you can do so
25 without violence to your own individual judgement.

Each juror must decide the case for himself or herself, but you should do so only after consideration with your fellow jurors of all the evidence in the case, and you shouldn't hesitate to change an opinion if you are convinced it is erroneous. However, if, after carefully considering all the evidence and the arguments of your fellow jurors, you entertain a conscientious view that differs from the others, you are not to yield your conviction simply because you are outnumbered or outweighed. You are composed of twelve jurors. You must consider each of the two counts in the indictment separately and render a separate verdict on each. You must all agree on a verdict of guilty or not guilty on each count you are considering, that is to say, your verdict on each of the counts must be unanimous.

As I told you earlier yesterday, Count One, the bank robbery, is to be considered first. You will then go and consider, if you find the defendant guilty on the bank robbery count, you will go on to consider the second count charging assault and endangering lives in the course of a robbery.

If in the course of your deliberations you want any of the exhibits or want any testimony referred to, Madam Foreman may send me a note to that effect. I will

be available to you throughout.

I think that is about all, ladies and gentlemen.

Your oaths that you took here as jurors sums up your duty, and that is: without fear or favor to any man, you will well and truly try the issues between this defendant and the Government according to the evidence given you in this courtroom and the laws of the United States as I have charged it to you.

Do you wish to be heard?

MR. SHAW: No, your Honor.

MR. BENTLEY: Nothing from the Government.

THE COURT: The next order of business is to swear in the marshal. Then I will go to the other matter I have to deal with.

(Marshal sworn.)

THE COURT: Now we come to Mr. Miner and Mr. Gray. Gentlemen, I know it is very frustrating to sit through a case and be discharged just as the case is about to come to a decision. I want to say to you, however, that it is important that you should have been here because the last case I tried I lost two jurors by illness toward the end of the case and it was fortunate that I had alternates because otherwise the whole thing would have been wasted and had to be done all over again. So you performed an

1 merf 13

2 THE COURT: You may bring the jury in, Madam
3 Clerk.

4 (Jury present.)

5 THE COURT: You may make the announcement,
6 Madam Clerk.

7 THE CLERK: His Honor is about to charge the jury.
8 Any spectator desiring to leave the courtroom must do so
9 now, otherwise you must remain seated until the completion
10 of the Court's charge.

11 Marshal, please lock the door.

12 CHARGE OF THE COURT

13 Judge Frederick Van Pelt Bryan

14 THE COURT: Mr. Foreman, ladies and gentlemen,
15 I am about to instruct you as to the law applicable to
16 this case.

17 Under our system of law it is my duty as the
18 Judge presiding at this trial to instruct you as to the
19 law that applies here, and it is your duty as jurors to
20 follow the law as I state it to you.

21 On the other hand, it is your exclusive function
22 to determine the facts in the case and to consider the
23 evidence for that purpose. Just as you cannot encroach
24 on my function, I cannot, and of course will not, encroach
25 on yours. You are the sole judges of the facts. It is

1 merf 14

2 not what counsel on either side has said or what I may say
3 as to what the evidence in this case proves. It is your
4 recollection and your judgment on the evidence that must
5 govern.

6 It is for you to determine what the evidence
7 shows, what weight is to be given to various portions of
8 the evidence, what portion of the evidence is to be believed
9 and what portion is to be disbelieved, what reliance is
10 to be placed on the testimony of the witnesses and what
11 reasonable inferences are to be drawn from the evidence.
12 You will resolve such conflicts as there are in the evidence
13 so as to determine for yourselves where the truth lies.

14 The verdict that you reach must be based solely
15 on the evidence given in this trial and on nothing else
16 and in accordance with the instructions I am now giving
17 you. I should tell you that the fact that the Government
18 is a party here entitles it to no greater consideration
19 than that accorded to any other party to a litigation.

20 By the same token, it is entitled to no less
21 consideration. All parties, Government and individuals
22 alike, stand equal before the bar of justice here. With
23 all this in mind let's turn to the case on trial.

24 In this case, the first count charges the
25 defendant John Evans with robbery of the branch of the

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Chase Bank at 580 Third Avenue, 39th Street, New York,
and to take money belonging to the bank by the use of
force, violence or intimidation.

The second count charges the defendant John Evans
with an assault or putting in jeopardy the lives of
persons by the use of firearms during the commission of
the bank robbery alleged in Count 1.

John Evans has pleaded not guilty to each of the
charges against him. He is the only defendant presently
before you. During the course of the trial there was
evidence indicating that several persons other than the
defendant now on trial were involved in one way or another
with the activities that are the subject of the indictment
here.

I charge you that the fact that these other people
are not now on trial before you has no significance whatsoever
and is to play no role in your deliberations. We are
concerned here only with whether John Evans now on trial
is guilty or not guilty of the charges against him.

Now, before I discuss the rules of law applicable
to the crimes charged in the indictment, I want to talk
with you a little about the effect that you are to give
to the indictment and the general rules you are to follow
in considering and weighing the evidence. The indictment

1 merf 16

2 I have just referred to is nothing but a written accusation.
3 It is only a means of bringing the defendant before the
4 Court and is not in itself any evidence whatsoever of
5 guilt.

6 The fact that the defendant is the subject of
7 this indictment and on trial should not be taken against
8 him in any way. The defendant is presumed to be innocent,
9 and this presumption has the weight and effect of evidence
10 on his behalf.

11 This presumption of innocence continues in the
12 defendant's favor throughout the trial and even during
13 your deliberations in the jury room, and is only overcome
14 if and when, in your minds, the guilt of the defendant
15 is established beyond a reasonable doubt.

16 A defendant doesn't have to prove himself innocent
17 of the charges against him. If a defendant so wishes he may
18 rest at the close of the Government's case, and he is not
19 required to produce any evidence on his own behalf, and
20 of course he may rely on evidence brought out on cross
21 examination of the prosecution's witnesses.

22 The burden of proof is on the prosecution to
23 establish the guilt of the defendant beyond a reasonable
24 doubt as to each charge. This burden on the prosecution
25 applies to each element of each of the crimes charged

1 merf 17

2 in the indictment. The burden never shifts to a defendant
3 to prove himself innocent and a defendant, I repeat, is not
4 required to call any witnesses or submit any proof of
5 his innocence, though of course he is fully entitled to do
6 so.

7 The prosecution's burden is not met unless and
8 until the proof offered and all the evidence in the case
9 convince you beyond a reasonable doubt of the defendant's
10 guilt as to the charge you are considering.

11 Now, what is a reasonable doubt? The words
12 really almost define themselves. A reasonable doubt is
13 a doubt founded on reason arising from the evidence or
14 the lack of evidence in the case. Reasonable doubt means
15 a doubt which a reasonable man or a reasonable woman has
16 after carefully weighing all the evidence. It is a doubt
17 that appeals to your reason, your judgment, your common
18 sense and understanding. It does not mean a doubt that is
19 capricious or imaginary or speculative. Neither does it
20 mean a doubt born of a reluctance on the part of a juror
21 to perform an unpleasant duty or a doubt arising out of sympathy
22 for a defendant or out of anything other than a candid,
23 objective consideration of all of the evidence.

24 Nor does proof beyond a reasonable doubt mean
25 proof to a **positive** certainty or proof beyond all possible

1 merf 18
2 doubt. You should carefully review and discuss all of
3 the evidence in the case, analyze it fully. If a fair and
4 impartial consideration of all the evidence produces a
5 settled and firm belief in your minds of a defendant's guilt
6 of a particular charge, such as would induce a prudent
7 person to act without hesitation in weighty and important
8 matters concerning his or her own affairs, then you may
9 say you have no reasonable doubt and you may find the
10 defendant guilty.

11 In other words, proof beyond a reasonable doubt
12 must be proof from the evidence of such a convincing
13 character that a prudent person would not hesitate
14 to rely upon it in acting on important affairs of his or
15 her own.

16 On the other hand, if after a fair and impartial
17 consideration of all the evidence you find that you have a
18 doubt, such as would cause a prudent person to hesitate
19 before acting in matters of importance to himself or herself,
20 **then you have a reasonable doubt** and you must return a verdict
21 of not guilty to the charge you are considering.

22 With these general principles in mind, let's now
23 turn to the specifics of this case. As I told you, there
24 are two charges here. Count 1, robbery of the bank,
25 we are of course talking about the Chase Manhattan Bank

1 merf 19

2 branch at 580 Third Avenue, by the use of force, violence
3 and intimidation, and Count 2, an assault or putting in
4 jeopardy the lives of persons by the use of firearms
5 during that robbery.

6 I am going to discuss the elements of each of
7 these two charges with you. I am first going to talk about
8 Count 1 charging a robbery. That is the count that
9 you will first consider.

10 Count 1 charges that on or about August 1, 1975,
11 in the Southern District of New York -- and this is
12 in the Southern District of New York, of course -- the
13 defendant unlawfully, wilfully and knowingly by force,
14 violence and intimidation, did take from the person and
15 presence of another property and money in the approximate
16 amount of \$29,000 odd dollars belonging to and in the care
17 and custody and possession of the Chase Manhattan Bank
18 at 580 Third Avenue, a bank the deposits of which were
19 then insured by the Federal Deposit Insurance Corporation.

20 The elements of the crime, each of which must be
21 proved to your satisfaction beyond a reasonable doubt,
22 are as follows:

23 First, that on or about August 1, 1975,
24 the Chase Manhattan Bank branch we are talking about was a
25 bank the deposits of which were insured by the Federal

1 merf 20

2 Deposits Insurance Corporation.

3 You won't have any trouble with that because
4 that is stipulated that it was so insured.

5 Second, that on that day the defendant took
6 money from the bank which belonged to or was in the bank's
7 custody, control, management or possession.

8 Third, that the money was taken from the person
9 or presence of individuals other than the defendant,
10 namely, employees and tellers of the bank.

11 Four, that the taking was accomplished through
12 the use of force, violence or intimidation, and fifth,
13 that the defendant wilfully and knowingly did all of the
14 acts charged.

15 The first three of these elements do not require
16 any elaboration.

17 As to the fourth element which is the taking
18 was accomplished by force, violence or intimidation,
19 a word or two is in order.

20 It is not required that the Government prove
21 that force and violence were actually used, if it proves
22 beyond a reasonable doubt that the taking of money from
23 the bank was the result of intimidation, that is to say,
24 the result of placing others in fear. Intimidation may
25 be established by proof of circumstances that are normally

merf 21

and reasonably calculated to arouse fear in the ordinary run of human beings. The question on this element is whether the Government has sustained its burden of showing conduct of such a nature as to provide a sensible and supportable basis for the creation of fear in other persons such as the use of a gun or threats of harm.

The fifth and final element to be established under Count 1 as I have mentioned is that the defendant wilfully and knowingly did the acts charged with intent to do them.

I will define these terms fully a little later. But let me say now I am sure you understand that should you find that the Chase Manhattan branch at 580 Third Avenue was robbed on August 1, 1975, this in itself would not establish that the defendant is guilty on Count 1.

The question here is whether this defendant, John Evans, participated in that robbery, whether John Evans was or was not one of the robbers.

The defendant insists that he did not participate in the robbery, and had nothing whatsoever to do with it. Thus, you cannot find the defendant guilty on Count 1 unless you find beyond a reasonable doubt that he was present in the bank on August 1, 1975 at the time of the robbery and was one of the persons who committed the

1 merf 22

2 robbery. The burden of proof resting on the prosecution
3 includes the burden of proving beyond a reasonable doubt
4 the identity of the defendant as the person who committed
5 and participated in that robbery.

6 In considering the question of identity, which is
7 really the crux of the question in this case, you may take
8 into account both the identification made of the defendant,
9 or failures to identify the defendant by persons having
10 an opportunity to do so. You may also consider the
11 circumstances under which a witness observed the persons
12 engaged in the robbery and how such circumstances
13 bear on his ability to make an identification.

14 Let me caution you that there are many difficulties
15 associated with identification testimony, and that
16 it should be considered by you very carefully.

17 There is one other matter in connection with
18 Count 1. As I told you, a person who actually commits
19 a bank robbery through force and violence or intimidation,
20 of course, commits a crime. It is also a crime not only
21 to commit these acts but to aid and abet another person doing
22 so. The law provides that whoever aids, abets, counsels,
23 commands or procures the commission of a crime is just as
24 guilty of the crime as if he had committed it himself.

25 Accordingly, you may find the defendant guilty

1 merf 23

2 of the offense charged in Count 1 if you find beyond
3 a reasonable doubt that another person or persons committed
4 the offense charged and that the defendant John Evans
5 aided and abetted these persons in carrying out the crime.

6 Now, what is aiding and abetting? The question is
7 whether a person participated in the venture. Was it some-
8 thing he wished to bring about? Did he seek by his own actions
9 to make it successful? If he did, then as aider and abetter
10 he is just as guilty as the principal.

11 You must find something more than mere knowledge
12 on a defendant's part that a crime was being committed.
13 The mere fact that one is present during the commission
14 of an offense, even if he has knowledge that the offense
15 is being committed, is insufficient to warrant a finding
16 that he aided and abetted.

17 Mere association with one who commits a crime
18 is not enough. A mere spectator or bystander is not an
19 aider or abetter. It must be established that the person
20 charged actually aided and abetted in the commission of
21 the crime wilfully and knowingly before he can be found
22 guilty of aiding and abetting.

23 Now, if after considering all of the evidence
24 you find that the Government has proved beyond a reasonable
25 doubt that the robbery was committed as charged and that

1 merf 24

2 the defendant was one of the persons who committed the
3 robbery or aided and abetted its commission, you may
4 find him guilty on Count 1.

5 If, on the other hand, you find the Government
6 has failed to prove beyond a reasonable doubt either that
7 the robbery was committed as charged or that the defendant
8 John Evans was one of those who participated in the robbery,
9 or aided and abetted it, then you must find John Evans
10 not guilty on Count 1.

11 As I told you, consider Count 1 first. If you
12 should find the defendant not guilty on Count 1, you will
13 cease your deliberations and report to the Court.

14 If, however, you should find the defendant
15 guilty on Count 1, you then proceed to Count 2.

16 Now, Count 2 charges that the defendant John
17 Evans, in committing the robbery of the Chase Manhattan
18 Third Avenue branch, as charged in Count 1, unlawfully,
19 wilfully and knowingly assaulted and put in jeopardy the
20 lives of persons by the use of a dangerous weapon, namely,
21 a firearm. That is a separate and distinct offense from
22 the offense charged in Count 1.

23 In order to find John Evans guilty on Count 2,
24 you must first find beyond a reasonable doubt that he
25 committed the bank robbery charged in Count 1. In addition,

1 you must find that in doing so, the defendant either
2 assaulted one or more persons or by the use of a dangerous
3 weapon, a firearm, put the lives or life of one or more
4 persons in jeopardy. It is not essential to find both an
5 assault and the endangering of the lives by the use of
6 weapons. An assault is defined as an unlawful attempt or
7 threat to use force or violence to inflict bodily injury.
8 When the attempt or threat is coupled with the apparent
9 present ability to carry it out so as to arouse fear in the
10 intended victim that he or she might be the subject of imme
11 mediate physical injury.

12 The flourishing a gun or pistol for the purpose
13 of putting a person in fear is sufficient to constitute an
14 assault.
15

16 Alternatively, if you find that the lives of
17 one or more persons were objectively placed in jeopardy or
18 danger by the use of a dangerous weapon you would also find
19 that this second element of the offense charged in count 2
20 was present.

21 Now, previously, I had mentioned the terms
22 unlawfully, knowingly and wilfully. To act unlawfully
23 simply means to do an act contrary to law. If he acts
24 knowingly, one acts voluntarily and intentionally and not
25

1 merf 26

2 because of mistake, accident, mere negligence or other
3 innocent reason. An act is wilful if it is done knowingly
4 and deliberately with the specific intent to do it.

5 Now, questions of a defendant's knowledge and
6 wilful intent to violate the law are questions of
7 fact to be determined by you just like any other question
8 of fact to be decided in this case.

9 However, unlike most questions of fact, **intent and**
10 knowledge involve what goes on in a man's mind or what
11 **purpose** motivates you in a given course of conduct.

12 We haven't yet devised an instrument for recording
13 what goes on in a man's mind and I frankly hope, ladies
14 and gentlemen, that we never will. Rarely is direct proof
15 available that man has knowledge of a particular fact
16 or has a particular purpose or intent in mind when he does
17 an act.

18 Thus, direct proof of knowledge of illegal purposes
19 or intent to participate in a criminal act in violation of
20 the law isn't necessary. Knowledge or intent may be
21 established by circumstantial evidence determined from
22 the acts and conduct and all the surrounding circumstances
23 and the natural inferences to be drawn from there. I am
24 going to talk to you a little later about circumstantial
25 evidence quite briefly.

1 merf 27.

2 Now, this has been a short case, and I am not
3 going to discuss the facts with you in any detail. They
4 have been discussed by counsel just a few minutes ago
5 in considerable detail. It seems clear that a robbery
6 occurred on August 1, 1975 at the Chase Bank, 38th Street
7 and Third Avenue.

8 The issue here is not whether a bank robbery
9 occurred. The question is whether or not the defendant
10 John Evans participated in that robbery. That is the
11 real question here.

12 And that in turn depends on the question of
13 identification of the defendant as a participant in the
14 robbery.

15 The real issue here is the identification issue
16 and that is the basic question you have got to decide
17 in determining whether John Evans is guilty beyond a reasonable
18 doubt of the charges against him.

19 Evans takes the position that the evidence as
20 to the identification of him is not sufficient to establish
21 beyond a reasonable doubt that he was the person involved
22 in the robbery on August 1, 1975 with which he is charged.
23 The Government, on the other hand, contends that the
24 evidence is sufficient to identify Evans as one of the
25 robbers beyond a reasonable doubt. In addition to the

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2 evidence on the question of identification, evidence was
3 introduced by the Defendant Evans for the purpose of
4 establishing an alibi, that is to say, that he wasn't
5 present at the Chase Bank on August 1, 1975, where he
6 is alleged to have committed the offense charged in the
7 indictment. Evans contends that he was in Chicago,
8 Illinois, on August 1, 1975, and wasn't in New York then,
9 and could not have been a participant in the Chase Bank
10 robbery, and he produced a witness who testified or witnesses
11 who testified to that effect.

12 The Government in turn adduced evidence which
13 it contends shows that the alibi testimony as to Evans'
14 presence in Chicago on August 1, 1975 should not be credited.
15 This evidence was to the effect that Evans was in
16 Philadelphia, Pennsylvania, on July 29, 1975, three days
17 before the robbery in New York, whereas the witnesses who
18 testified as to his presence in Chicago on August 1st,
19 also indicated he was in Chicago on July 29th.

20 The Government contends that this discredits
21 the alibi testimony.

22 If, after consideration of all the evidence,
23 you have a reasonable doubt as to whether Evans was present
24 at the Chase Bank on August 1, 1975, when the alleged offense
25 was committed, you must acquit him.

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2 You will bear in mind again, however, that the
3 law never imposes on a defendant in a criminal case the
4 duty or burden of calling any witnesses or producing
5 any evidence so that even if the testimony of the alibi
6 witnesses is disbelieved, the burden of proof of guilt
7 beyond a reasonable doubt remains on the Government.

8 I want to talk to you about credibility of
9 witnesses because plainly questions of credibility are
10 of importance. Questions of a witness' credibility
11 are exclusively for you to pass on and it is for you the
12 jury to determine what parts of the evidence you believe
13 and what parts of the evidence you disbelieve and reject.
14 Credibility is just another word for believability.
15 The appraisal of the credibility to be given to the
16 testimony of a witness is very much governed by your own
17 plain every day common sense. People in your daily lives
18 may tell you things which may or may not influence important
19 decisions that you make.

20 You consider whether these people have the capacity
21 and the opportunity to observe, be familiar with and to
22 remember and accurately report things they tell you. You
23 consider any possible interest they may have in the
24 results to be obtained, any bias or prejudice they may
25 have, any motive they may have to testify falsely.

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2 You consider a person's character, whether he
3 or she is believable or not. You consider his or her
4 demeanor. You decide whether he or she strikes you as
5 fair, and candid, and then you consider the inherent
6 believability of what is said, and whether it accords with
7 your own knowledge and experience. It is the same thing
8 with witnesses. You watch them on the stand as they testify.
9 You ask yourselves whether they know what they are talking
10 about and are fairly reporting it. You evaluate their
11 truthfulness. You take into account the extent to
12 which they may have been impeached as witnesses, either
13 generally or specifically or whether they made any
14 statements inconsistent with or contradictory to the
15 testimony they gave on the witness stand or to other
16 facts you know to be true.

17 You take into account their motive, if they have
18 any to testify falsely. In other words, what you do is to
19 size a person up and determine whether he or she is truthful,
20 candid and straight-forward, and whether you think you
21 should believe his testimony.

22 You may disregard all of the testimony of the
23 witness if you don't believe him, or you may accept such
24 part of it as you believe and find reliable and disregard the
25 rest.

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2 Now, John Evans did not take the stand in this
3 case. The Constitution and laws of the United States
4 provide that in any trial of a criminal charge the
5 defendant is under no obligation to testify or indeed
6 to come forward with any evidence because the burden
7 of proving a violation of law is solely and exclusively
8 on the prosecution.

9 I therefore charge you that you may not consider
10 in any way the fact that John Evans has chosen not to testify
11 in this case. That is his right under the law and you are
12 not permitted to speculate upon reasons why he did not
13 testify nor may you draw any inference of any kind from
14 his decision not to take the stand.

15 His decision is a choice shared by every defendant
16 in a criminal trial in this country and may in no way
17 be used against him as a substitute for or as a supplement
18 to the evidence against him.

19 I want to discuss briefly the subject of circum-
20 stantial and direct evidence. There are two classes of
21 evidence recognized and admitted in the courts. One is
22 direct and the other is circumstantial. You may consider
23 both kinds in determining the guilt or innocence of the
24 accused.

25 Direct evidence is where a witness testifies

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2 as to facts of his own knowledge, things that he saw that
3 he was present at, things he watched, and anything that
4 a witness testifies about which comes to him or
5 her by virtue of his or her own senses, own observations,
6 is direct evidence.

7 Circumstantial evidence is where proof is given
8 of facts or circumstances from which one may infer other
9 connected facts which reasonably follow in the common
10 experience of mankind.

11 Let me give you a very simple example:

12 Suppose you are in a house. The shades are
13 pulled down. And a man comes in wearing a wet raincoat
14 and rubbers. His hat is wet and he has a dripping umbrella
15 in his hands. Since the shades are pulled down and you
16 haven't looked out the window, you haven't seen of your
17 own knowledge and you don't know of your own knowledge
18 whether it is raining outside.

19 But even if you haven't seen whether or not it
20 is raining, because the man has come in with a dripping
21 umbrella, wet raincoat, wet clothes and so forth, obviously
22 you are entitled to conclude it was raining outside.

23 Now, that, of course is an oversimplification
24 of what I am talking about. But it is an illustration
25 of what we mean by circumstantial evidence.

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Circumstantial evidence, if it is believed, is of no less value than direct evidence for in either case, no matter what type of evidence you are considering, you must be convinced beyond a reasonable doubt of the defendant's guilt before you can convict him of a charge.

I think all of you must remember that no conviction can be based on suspicion or conjecture or speculation, no matter how strong. A conviction can only be based on actual proof of guilt beyond a reasonable doubt and if the proof doesn't meet that standard, you must acquit.

Now, with these general principles -- and you will be glad to hear I am almost finished, ladies and gentlemen -- with these general principles I have given you, you will consider all the evidence and approach the important question of whether or not the prosecution has proved beyond a reasonable doubt that the defendant John Evans is guilty of the charges against him.

You must remember it is not the number of witnesses or the quantity of proof which determines the issue. It is the quality of the evidence in terms of its believability and truthfulness under the standards I have given you which should be controlling in your minds.

Let me remind you again that the prosecution has the burden of proving each element of each crime charged

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beyond a reasonable doubt as I have explained it to you.

If you find that the evidence fails to establish a crime charged or any element of the crime charged beyond a reasonable doubt, you must find the defendant not guilty on that charge.

However, if you find beyond a reasonable doubt that the defendant has violated the law as charged, you should not be reluctant because of sympathy or for any other reason to bring in a verdict of guilty.

The actions of the Court during the trial in ruling on motions or objections or in questioning witnesses are not to be taken by you as any indication of the guilt or innocence of the defendant.

These are matters of procedure and law with which you have no concern. The arguments of counsel addressed to the Court on questions of law or on motions during the course of the trial as well as any bench conferences that may have taken place at the side bar are also to be disregarded.

Counsels' statements and arguments on summation are not evidence, nor are the questions they ask. The only evidence is the evidence given by the witnesses on the witness stand as you recollect it, Exhibits in evidence, and the stipulations as to facts entered into

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2 between opposing counsel and put in the record. Remember,
3 where the answers of a witness have been excluded or
4 stricken from the record you must disregard the question
5 and the answer.

6 Only the matters which the Court admitted in
7 evidence, which are a part of the record, are to be con-
8 sidered by you in reaching your verdict.

9 Any questions that I ask of witnesses were
10 merely intended to clarify and expedite matters and not
11 to suggest any opinion as to the guilt or innocence of the
12 defendant here.

13 I have talked about inferences. What I mean
14 by an inference is simply this, a deduction or conclusion
15 which reason and common sense leads the jury to draw from
16 facts which have been proved. Remember, it is your recollec-
17 tion of the evidence presented here and your decision as to
18 what reasonable inferences should be drawn therefrom which
19 govern.

20 As I mentioned, when the attorneys on both sides
21 stipulate or agree to the existence of a fact, the
22 jury can accept the stipulation and regard the fact
23 as proved.

24 The question of possible punishment of the
25 defendant if he should be convicted is of no concern of

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2 yours. It should not enter in any sense into your
3 deliberations or influence them in any way.

4 If there should be a finding of guilty as to
5 the defendant the duty of imposing sentence rests
6 exclusively with me. It is no concern of yours.

7 I am not going to say much about your deliberations. I
8 think all of you understand that the object of your
9 deliberations is to exchange views with your fellow
10 jurors, to discuss, consider the evidence, and listen to
11 everybody's arguments and to reach an agreement based solely
12 on the evidence if you can do so without violation --
13 without doing violence to your individual judgment.

14 Each juror must decide the case for himself
15 or herself, but you should do so only after consideration
16 with your fellow jurors of the evidence, all of the
17 evidence in the case, and shouldn't hesitate to change an
18 opinion when convinced it is erroneous.

19 However, if after carefully considering all
20 of the evidence and the arguments of your fellow jurors
21 you entertain a conscientious view that differs from the
22 others, you are not to yield your conviction simply
23 because you are outnumbered or outweighed or in the
24 minority. Juries are composed of 12 jurors. You must
25 consider each of the two counts of the indictment

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2 separately and render a separate verdict on each.

3 You must all agree on a verdict of guilty or not
4 guilty on each count you are considering. That is to say
5 your verdict on each of the counts must be unanimous.

6 As I have told you earlier, you should consider
7 Count 1, the bank robbery first. If you find the defendant
8 not guilty on Count 1, you may cease your deliberations
9 and report your verdict to the Court.

10 If, however, you find the defendant guilty
11 on Count 1, then go on to consider Count 2, the count
12 charging assault and endangering lives in the course of
13 the robbery.

14 I have said each of your verdicts must be unanimous.
15 If during the course of your deliberations you want any of
16 the exhibits or want any testimony read, your foreman
17 may send me a note to that effect.

18 I think that is about all, ladies and gentlemen.

19 Your oath that you took here as jurors sums
20 up your duty, and that is without fear or favor to any
21 man, you will well and truly try the issues between this
22 defendant and the Government according to the evidence
23 given you in this courtroom and the laws of the United
24 States as I have charged them to you.

25 Do either counsel wish to be heard?

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2 MR. LANDAU: No, sir.

3 MR. BENTLEY: Nothing from the Government.

4 THE COURT: Well, now, before we swear the
5 marshals, I have a little task here, which is always I
6 think somewhat distasteful. The twl alternate jurors,
7 Mr. Gangras and Mrs. Betts, have sat through this trial
8 and I know how frustrating it must be when you sit through
9 a trial and hear all the evidence and the decision is
10 about to be made, not to be able to participate.
11 But I want to tell you that if somebody had gotten ill or
12 there had been a crisis in one of the familvs this
13 trial would have been wasted and you have performed a
14 public service by being here ready to step in if such
15 had occurred.

16 You may go with the thanks of the Court.

17 (Alternates excused.)

18 THE COURT: Now, will you sear the marshals,
19 please.

20 (Two marshals sworn.)

21 THE COURT: Now, Mr. Gangras and Mrs. Betts are
22 excused and if you will pick up your things and depart
23 with the thanks of the Court.

24 THE CLERK: They are to report to work tomorrow
25 and Monday come back to the jury room at 9:00 o'clock.

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2 THE COURT: Now, ladies and gentlemen, we
3 are going back to our other courtroom tomorrow, so we will
4 be there in room 601 as we were before, and your jury room
5 with the windows looking outside is much more pleasant
6 than this rather dingy place in which you have been
7 incarcerated most of the afternoon, so I will see you
8 tomorrow morning at 9:30 in room 601. And please, in
9 the morning, Mr. Foreman, don't start your deliberations
10 until everybody is there so that nobody misses anything
11 that is going on, and of course, I repeat, don't talk about
12 the case to anyone else.

13 Goodnight to you and thank you very much.
14 I am sorry to have kept you so late but at least we have
15 got the case completed.

16 (Jury left courtroom.)

17 THE COURT: I think that's all, gentlemen.
18 Just come inside, and Mr. Marshal in charge of the defendant,
19 the defendant is excused for the day.

20 THE MARSHAL: Thank you, your Honor.

21 THE COURT: All right.

22 (Adjourned to Friday, October 29, 1976 at 9:30 a.m.)
23
24
25

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MAR 15 1977
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SO. DIST. OF N. Y.